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CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA
BY DEPUTY

The Honorable Karen Strombom

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, Plaintiff v. BILLY J. SWANN, Defendant.	NO. CR16-5542 **PLEA AGREEMENT**

The United States of America, by and through Annette L. Hayes, United States Attorney for the Western District of Washington, and Seth Wilkinson, Assistant United States Attorney, BILLY J. SWANN, and his attorney, Douglas Tufts, enter into the following Agreement, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B):

1. **The Charge**. Defendant, having been advised of the right to have this matter tried before a jury, agrees to waive that right and enter a plea of guilty to violating the Endangered Species Act, Title 16, United States Code, Sections 1538(a)(1)(D), 1538(a)(1)(G) and 1540(b), as charged in Count 1 of the Information.

By entering a plea of guilty, Defendant hereby waives all objections to the form of the charging document. Defendant further understands that before entering the guilty

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plea, Defendant will be placed under oath. Any statement given by Defendant under oath may be used by the United States in a prosecution for perjury or false statement.

2. **Elements of the Offense.** The elements of the offense to which Defendant is pleading guilty are as follows:

a. The defendant violated a regulation pertaining to a threatened species listed pursuant to 16 U.S.C.§ 1533; and

b. The defendant acted knowingly and without permission from the United States Department of the Interior.

50 C.F.R. § 223.203(a) prohibits the taking, possession, sale, delivery, and transportation of naturally-spawned salmon with intact adipose fins originating from the Lower Columbia River ecologically sensitive unit.

3. **The Penalties.** Defendant understands that the statutory penalties for violating the Endangered Species Act are as follow: A term of imprisonment of up to one year, a fine of up to $250,000 or twice the gross gain or loss resulting from the offense, a period of supervision following release from prison of up to one year, and a mandatory special assessment of $25. If a probationary sentence is imposed, the probationary period can be up to five years. Defendant agrees that the special assessment shall be paid at or before the time of sentencing.

Defendant understands that supervised release is a period of time following imprisonment during which Defendant will be subject to certain restrictive conditions and requirements. Defendant further understands that if supervised release is imposed and Defendant violates one or more of the conditions or requirements, Defendant could be returned to prison for all or part of the term of supervised release that was originally imposed. This could result in Defendant serving a total term of imprisonment greater than the statutory maximum stated above.

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Defendant understands that as a part of any sentence, in addition to any term of imprisonment and/or fine that is imposed, the Court may order Defendant to pay restitution to any victim of the offense, as required by law.

Defendant agrees that any monetary penalty the Court imposes, including the special assessment, fine, costs, or restitution, is due and payable immediately and further agrees to submit a completed Financial Statement of Debtor form as requested by the United States Attorney's Office.

4. **Rights Waived by Pleading Guilty.** Defendant understands that by pleading guilty, Defendant knowingly and voluntarily waives the following rights:

a. The right to plead not guilty and to persist in a plea of not guilty;

b. The right to a speedy and public trial before a jury of his or her peers;

c. The right to the effective assistance of counsel at trial, including, if Defendant could not afford an attorney, the right to have the Court appoint one for Defendant;

d. The right to be presumed innocent until guilt has been established beyond a reasonable doubt at trial;

e. The right to confront and cross-examine witnesses against Defendant at trial;

f. The right to compel or subpoena witnesses to appear on defendant's behalf at trial;

g. The right to testify or to remain silent at trial, at which trial such silence could not be used against Defendant; and

h. The right to appeal a finding of guilt or any pretrial rulings.

5. **Ultimate Sentence.** Defendant acknowledges that no one has promised or guaranteed what sentence the Court will impose.

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6. **Statement of Facts**. Defendant admits he is guilty of the charged offense. The parties agree on the following facts:

a. Defendant is the owner and operator of Swanny's Guided Fishing, a Washington company that leads guided fishing trips on the rivers of Western Washington including the Cowlitz River.

b. Naturally spawned Coho salmon originating from the Cowlitz River are listed as a threatened species under the Endangered Species Act ("ESA") and may not be taken, captured, sold, possessed, transported or delivered. 50 C.F.R. 223.102. Washington law also prohibits the removal from the Cowlitz River of any wild Coho salmon. WAC 220-310-185(22). A "wild" salmon is defined as any Coho salmon with an unclipped adipose fin. WAC 220-16-470.

c. On October 1, 2014, defendant provided guiding services for a group of three clients. While fishing on the Cowlitz River, defendant encouraged and aided members of the group to remove two naturally-spawned Coho salmon from the river. The salmon had unclipped adipose fins and were protected under the ESA. After landing the fish, defendant clubbed the fish, killing both of them.

d. At some point during the fishing excursion, defendant became aware that it was unlawful to take the wild salmon. Defendant contends that he became aware of this fact after the fish were landed. To conceal the fact that defendant had possession of wild salmon in violation of the ESA and Washington law, defendant used a blade to remove the intact adipose fins from the salmon. Further, defendant directed the two clients who had landed the fish to falsely record on their Washington Department of Fish and Wildlife Sport Catch Record Cards that the salmon were hatchery salmon when, as defendant knew, the fish were wild salmon.

e. On January 22, 2015, defendant participated in an interview with a Special Agent of the National Oceanic and Atmospheric Administration ("NOAA"). During the interview, defendant denied that the salmon were taken unlawfully, and stated that photographs published on the internet of the fish with the adipose fins intact "could have been photo shopped."

7. **United States Sentencing Guidelines**. Defendant understands and acknowledges that the Court must consider the sentencing range calculated under the United States Sentencing Guidelines and possible departures under the Sentencing Guidelines together with the other factors set forth in Title 18, United States Code,

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Section 3553(a), including: (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (4) the need for the sentence to afford adequate deterrence to criminal conduct; (5) the need for the sentence to protect the public from further crimes of the defendant; (6) the need to provide the defendant with educational and vocational training, medical care, or other correctional treatment in the most effective manner; (7) the kinds of sentences available; (8) the need to provide restitution to victims; and (9) the need to avoid unwarranted sentence disparity among defendants involved in similar conduct who have similar records. Accordingly, Defendant understands and acknowledges that:

a. The Court will determine Defendant's applicable Sentencing Guidelines range at the time of sentencing;

b. After consideration of the Sentencing Guidelines and the factors in 18 U.S.C. § 3553(a), the Court may impose any sentence authorized by law, up to the maximum term authorized by law;

c. The Court is not bound by any recommendation regarding the sentence to be imposed, or by any calculation or estimation of the Sentencing Guidelines range offered by the parties or the United States Probation Department, or by any stipulations or agreements between the parties in this Plea Agreement; and

d. Defendant may not withdraw the guilty plea solely because of the sentence imposed by the Court.

8. **Acceptance of Responsibility.** The United States acknowledges that if Defendant qualifies for an acceptance of responsibility adjustment pursuant to USSG § 3E1.1(b), and if Defendant's offense level exceeds 16, the total offense level should be decreased by three levels (or two levels if the offense level is less than 16) because Defendant has clearly demonstrated acceptance of responsibility for the offense and has

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assisted the government by timely notifying the authorities of Defendant's intention to plead guilty.

9. **Sentencing Factors**. The parties agree that the following Sentencing Guidelines provisions apply to this case:

a. The base offense level is six. USSG § 2Q2.1(a); and

b. The offense level should be increased by two points because the offense was committed for pecuniary gain or commercial purpose or involved a pattern of similar violations. USSG § 2Q2.1(b)(2); and

c. The offense level should be increased by four points because the offense involved a species listed under the Endangered Species Act. USSG § 2Q2.1(b)(3)(B).

The parties agree they are free to present arguments regarding the applicability of all other provisions of the United States Sentencing Guidelines. Defendant understands, however, that at the time of sentencing, the Court is free to reject these stipulations, and is further free to apply additional downward or upward adjustments in determining Defendant's Sentencing Guidelines range.

10. **Sentencing Recommendation:** The government agrees to recommend that defendant be sentenced to a term of probation. The parties agree that the terms of probation should include(a) a fine of not less than $5,000 and not more than $10,000, with each party free to recommend any amount within that range; and (b) a requirement that defendant publish a statement in a fishing trade publication approved by the government. The statement, which must also be approved by the government prior to publication, will acknowledge that wild salmon were unlawfully taken on a fishing trip led by defendant, and will emphasize the importance of complying with federal and state laws protecting fish and wildlife. Defendant understands that these recommendations are not binding on the Court.

11. **Non-Prosecution of Additional Offenses**. As part of this Plea Agreement, the United States Attorney's Office for the Western District of Washington agrees not to

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prosecute Defendant for any additional offenses known to it as of the time of this Agreement that are based upon evidence in its possession at this time, and that arise out of the conduct giving rise to this investigation, and to move to dismiss the remaining counts in the indictment at the time of sentencing.

In this regard, Defendant recognizes the United States has agreed not to prosecute all of the criminal charges the evidence establishes were committed by Defendant solely because of the promises made by Defendant in this Agreement. Defendant agrees, however, that for purposes of preparing the Presentence Report, the United States Attorney's Office will provide the United States Probation Office with evidence of all conduct committed by Defendant.

12. **Breach, Waiver, and Post-Plea Conduct.** Defendant agrees that if Defendant breaches this Plea Agreement, the United States may withdraw from this Plea Agreement and Defendant may be prosecuted for all offenses for which the United States has evidence. Defendant agrees not to oppose any steps taken by the United States to nullify this Plea Agreement, including the filing of a motion to withdraw from the Plea Agreement. Defendant also agrees that if Defendant is in breach of this Plea Agreement, Defendant has waived any objection to the re-institution of any charges in the Indictment that were previously dismissed or any additional charges that had not been prosecuted.

Defendant further understands that if, after the date of this Agreement, Defendant should engage in illegal conduct, or conduct that violates any conditions of release or the conditions of his confinement, (examples of which include, but are not limited to, obstruction of justice, failure to appear for a court proceeding, criminal conduct while pending sentencing, and false statements to law enforcement agents, the Pretrial Services Officer, Probation Officer, or Court), the United States is free under this Agreement to file additional charges against Defendant or to seek a sentence that takes such conduct into consideration by requesting the Court to apply additional adjustments or enhancements in its Sentencing Guidelines calculations in order to increase the applicable

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advisory Guidelines range, and/or by seeking an upward departure or variance from the calculated advisory Guidelines range. Under these circumstances, the United States is free to seek such adjustments, enhancements, departures, and/or variances even if otherwise precluded by the terms of the plea agreement.

13. **Waiver of Appellate Rights and Rights to Collateral Attacks.** Defendant acknowledges that by entering the guilty plea(s) required by this plea agreement, Defendant waives all rights to appeal from Defendant's conviction and any pretrial rulings of the court. Defendant further agrees that, provided the court imposes a custodial sentence that is within or below the Sentencing Guidelines range (or the statutory mandatory minimum, if greater than the Guidelines range) as determined by the court at the time of sentencing, Defendant waives to the full extent of the law:

a. Any right conferred by Title 18, United States Code, § 3742, to challenge, on direct appeal, the sentence imposed by the court, including any fine, restitution order, probation or supervised release conditions, or forfeiture order (if applicable); and

b. Any right to bring a collateral attack against the conviction and sentence, including any restitution order imposed, except as it may relate to the effectiveness of legal representation; and

This waiver does not preclude Defendant from bringing an appropriate motion pursuant to 28 U.S.C. § 2241, to address the conditions of Defendant's confinement or the decisions of the Bureau of Prisons regarding the execution of Defendant's sentence.

If Defendant breaches this Plea Agreement at any time by appealing or collaterally attacking (except as to effectiveness of legal representation) the conviction or sentence in any way, the United States may prosecute Defendant for any counts, including those with mandatory minimum sentences, that were dismissed or not charged pursuant to this Plea Agreement.

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14. **Voluntariness of Plea.** Defendant agrees that Defendant has entered into this Plea Agreement freely and voluntarily and that no threats or promises, other than the promises contained in this Plea Agreement, were made to induce Defendant to enter the plea of guilty.

15. **Statute of Limitations.** In the event this Agreement is not accepted by the Court for any reason, or Defendant has breached any of the terms of this Plea Agreement, the statute of limitations shall be deemed to have been tolled from the date of the Plea Agreement to: (1) thirty (30) days following the date of non-acceptance of the Plea Agreement by the Court; or (2) thirty (30) days following the date on which a breach of the Plea Agreement by Defendant is discovered by the United States Attorney's Office.

16. **Completeness of Agreement.** The United States and Defendant acknowledge that these terms constitute the entire Plea Agreement between the parties. This Agreement binds only the United States Attorney's Office for the Western District of Washington. It does not bind any other United States Attorney's Office or any other office or agency of the United States, or any state or local prosecutor.

Dated: November 30, 2016.

BILLY J. SWANN
Defendant

DOUGLAS TUFTS
Attorney for Defendant

SETH WILKINSON
Assistant United States Attorney

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